**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

REBECCA BROWN, AUGUST TERRENCE ROLIN, STACY JONES-NASR, and MATTHEW BERGER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TRANSPORTATION SECURITY ADMINISTRATION; ADAM STAHL, in his official capacity as Senior Official Performing the Duties of the Administrator of the Transportation Security Administration; DRUG ENFORCMENT ADMINISTRATION; DEREK S. MALTZ, in his official capacity as Acting Administrator of the Drug Enforcement Administration; UNITED STATES OF AMERICA,[1]

Defendants.

Civil Action No. 2:20-cv-64-MJH-KT

DEFENDANTS' PARTIAL MOTION TO DISMISS

Defendants in the above-captioned proceeding hereby move to dismiss Count III of Plaintiffs' First Amended Complaint, ECF No. 43, without prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1). The grounds for this motion are set forth more fully in the accompanying memorandum in support of this motion. A proposed order is attached.

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Senior Official Performing the Duties of the Administrator of the Transportation Security Administration Adam Stahl is automatically substituted for former Administrator David P. Pekoske and Acting Administrator of the Drug Enforcement Administration Derek S. Maltz is automatically substituted for former Administrator Anne Milgram.

Dated: April 15, 2025

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS

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INTRODUCTION

Count III of Plaintiffs' First Amended Complaint alleges that the U.S. Drug Enforcement Administration ("DEA") has a policy or practice of seizing travelers at U.S. airports and their cash without probable cause in violation of the Fourth Amendment based only on those travelers carrying large amounts of cash. On November 12, 2024, however, the Deputy Attorney General ordered DEA to suspend its entire transportation facilities interdiction program, ending seizures at airports unless made pursuant to an ongoing, predicated investigation involving identified targets or criminal networks. That suspension became permanent on January 8, 2025, when DEA's Administrator terminated that transportation interdiction program and directed that agents and resources assigned to that program be redeployed.

These actions, taken roughly five years after this litigation was first brought and for reasons unrelated to Plaintiffs' suit, moot Count III. Because the broader transportation interdiction program has been terminated, the seizures that Plaintiffs challenge as part of a purported policy or practice conducted under that program are no longer taking place. Accordingly, the relief that Plaintiffs seek—an injunction enjoining the alleged policy or practice regarding seizures and declaratory relief that the alleged policy or practice violates the Fourth Amendment—would have no effect. Indeed, any ruling this Court issues on Count III would amount to an advisory opinion on the legality of a now-defunct policy or practice. Dismissal without prejudice is required in these circumstances.

That the agency itself changed course does not change this conclusion because there is no indication that DEA will reinstate the specific alleged policies and practices after this action is dismissed. For one, government officials enacting formal changes in policy are entitled to a presumption of good faith. For another, the timing (five years after this case was brought) and reasoning (in response to reviews of the program by DEA, the Department of Justice, and the Office of the Inspector General (OIG)) behind the termination of the broader program demonstrate that the agency's actions are not an attempt to avoid an adverse judgment from this Court.

Finally, that the new administration is considering whether to adopt a new program, a new process, or new enforcement guidance for DEA interdiction efforts at transportation facilities only

emphasizes that Count III is moot. Any new program, if adopted, would be implemented only after full consideration of the OIG's November 21, 2024 Management Advisory Memorandum and supported by newly designed training modules crafted by DEA in response to OIG's concerns and provided by new instructors. That any new enforcement guidance would result in a different program, based on new policies, and implemented under modified training modules renders advisory any ruling addressed to the *prior* permanently rescinded interdiction program.

At a minimum, even if this Court determines that this case is not constitutionally moot because there exists some possibility that the alleged policies and practices could recur, the Court should dismiss Count III on prudential mootness grounds. The Supreme Court and Third Circuit have both instructed courts to exercise their discretion to dismiss claims for injunctive and declaratory relief in cases where that relief addresses hypothetical injuries attributed to government programs that are under internal review. And discretionary dismissal in those circumstances is particularly warranted when affording such relief requires the Court to resolve weighty constitutional questions that implicate the policy decisions of coordinate branches. That is the case here: at best, Plaintiffs can speculate that DEA *may* reinstate a transportation interdiction program, which *may* implicate bulk cash, which *may* result in future seizures, which *may* be made pursuant to policies and practices that resemble those that Plaintiffs allege violate the Fourth Amendment in their action. Even if such speculation were sufficient to overcome constitutional mootness, it does not warrant the relief sought.

For these reasons, detailed further below, the Court should dismiss Count III as moot.

BACKGROUND

I. Plaintiffs' Allegations as to DEA Center on DEA's Operation Jetway Interdiction Program.

Plaintiffs allege in Count III of their First Amended Complaint that DEA operates "an Operation Jetway airport interdiction program at every major commercial airport in the United States" through which "DEA conducts tens of thousands of seizures of cash" at U.S. airports every year. 1st Am. Compl. ¶¶ 405-409; *see also* Pls.' Opp. to Defs.' Mot. to Dismiss at 24-25, ECF No. 62. Count III challenges two aspects of DEA's airport interdiction program. Specifically, Plaintiffs allege that

"DEA follows a policy or practice of conducting suspicionless non-consensual seizures of travelers at U.S. airports" and a "policy or practice of seizing cash without probable cause from travelers at U.S. airports for civil forfeiture based solely on the presence of a large amount of cash." 1st Am. Compl. ¶¶ 505, 508, ECF No. 43; *see also id.* ¶ 459(c) ("DEA interdiction agents nationwide regularly seize airport travelers based solely on the agents' knowledge or belief that those specific travelers are traveling with a 'large' amount of cash.").

Pursuant to that claim, Plaintiffs seek "declaratory and injunctive relief against DEA" "to remedy DEA's unlawful policies or practices, which will otherwise continue," under the Administrative Procedure Act (APA) and Fourth Amendment. *See* 1st Am. Compl. ¶¶ 501-502, 516. Specifically, Plaintiffs seek: (1) "declaratory relief . . . declaring unconstitutional under the Fourth Amendment DEA's policy or practice of seizing air travelers at U.S. airports because of DEA agents' knowledge or belief that they are traveling with a large amount of cash"; (2) "injunctive relief . . . enjoining DEA's policy or practice of seizing air travelers at U.S. airports because of DEA agents' knowledge or belief that they are traveling with a large amount of cash"; (3) "declaratory relief . . . declaring unconstitutional under the Fourth Amendment DEA's policy or practice of seizing cash from air travelers at U.S. airports for civil forfeiture because they are traveling with at least $5,000 or any other threshold amount of cash deemed presumptively subject to seizure regardless of whether there is probable cause"; and (4) "injunctive relief . . . enjoining DEA's policy or practice of seizing cash from air travelers at U.S. airports for civil forfeiture because they are traveling with at least $5,000 or any other threshold amount of cash deemed presumptively subject to seizure regardless of whether there is probable cause." 1st Am. Compl., Request for Relief ¶¶ G-J.

Apart from Count III, there are no remaining claims against DEA or the DEA Acting Administrator.[2]

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[2] Counts I and II involve the Transportation Security Administration (TSA) and are unaffected by this motion. Counts IV and V were dismissed by this Court on March 30, 2021. *See* Opinion at 8, ECF No. 78 (W.D. Pa. Mar. 30, 2021).

II. The Deputy Attorney General Suspended, and the DEA Administrator Has Now Terminated, the Transportation Facilities Interdiction Program.

On November 12, 2024, the Deputy Attorney General issued a memorandum to the Administrator of DEA titled "Transportation Facilities Interdiction Program Directive." *See* Declaration of Alexander W. Resar ("Resar Decl."), Ex. B. The memorandum begins by noting "[i]nternal and ongoing reviews by the Department of Justice, Drug Enforcement Administration (DEA), and Office of Inspector General have identified concerns with DEA's use of consensual encounters unconnected to an existing investigation with individuals at mass transportation facilities as part of DEA's broader transportation interdiction activities ('transportation facilities interdiction program' or 'program')." *Id.* at 1. The memorandum explains that those "reviews have prompted the need for a broader review of the costs and benefits of the program, including whether it remains effective and useful given DEA's priorities and limited resources." *Id.* The Deputy Attorney General then directed DEA to "suspend conducting consensual encounters pursuant to the program, subject to my further review following the assessment and evaluation" "[u]ntil the utility of conducting consensual encounters pursuant to the transportation [facilities interdiction] program is evaluated, assessed, and identified concerns are sufficiently addressed." *Id.* The Deputy Attorney General further directed that "[c]onsensual encounters pursuant to the program may not be resumed absent explicit direction from the Deputy Attorney General." *Id.*

The November 12, 2024 memorandum became public on November 21, 2024, when the Department of Justice OIG issued Management Advisory Memorandum 25-005, Notification of Concerns Identified in the Drug Enforcement Administration's Transportation Interdiction Activities, which made recommendations to DEA and the Deputy Attorney General. *See* Resar Decl., Ex. C. The concerns that OIG identified were that: (1) "DEA was not complying with DEA policy to complete the DEA-177 Consensual Encounter Form (DEA-177 form) for each consensual

encounter"; and (2) "DEA was not ensuring that all DEA task force personnel complete interdiction training required by DEA policy." *Id.* at 2.[3]

On January 8, 2025, the DEA Administrator issued a memorandum titled "Transportation Interdiction Program" (TIP) ending that program. Resar Decl., Ex. A. The memorandum explained that "[d]uring the last several months, the Office of the Administrator has conducted a review of DEA's TIP during which we evaluated the program's effectiveness, assessed the risks of continuing TIP, and the extent to which it supports our core mission." *Id.* at 1. The Administrator stated that "[a]fter reviewing data"—"from across the agency, including drug and money seizures and arrests at mass transportation facilities"—"and the operating cost of the TIP and comparing it to our traditional investigations, it became clear that the TIP is not an effective way to utilize our limited resources." *Id.* at 2. In support, the Administrator explained that "from 2022-2024, TIP seizures totaled approximately $22 million in drug proceeds and resulted in a total of 57 arrests," while "predicated investigations focused on criminal networks, illicit financing, etc., seizure more than $1.4 billion and arrested thousands of individuals" over that same time frame. *Id.* She also noted that "[g]lobal criminal networks, like the Sinaloa and Jalisco Cartels, have expanded their money laundering methods, and today increasingly use cryptocurrency." She further noted that "[t]he internal review also found that we had not fully complied with DEA TIP policy, including to document all consensual encounters when they occurred." *Id.*

The Administrator concluded "[b]ased on the internal review and after considering the potential risks of continuing the TIP, I have directed the Operations Division to immediately cease the program and to work with Special Agents in Charge to redeploy those resources to global supply chain and illicit finance investigations." *Id.* She finally noted that any "consensual encounter that otherwise would be prohibited" by the Administrator's termination of the transportation interdiction program, could only occur if "approved by the Administrator" and "provided prompt notice is given

[3] OIG's report also identified concerns regarding a particular DEA office's use of a "Limited Use CS [confidential source], who is an employee of a commercial airline" and has for several years received "a percentage of forfeited cash seized by the DEA office from passengers at the local airport when the seizure resulted from information the CS had provided to DEA." Resar Decl., Ex. C at 5.

to the Office of the Deputy Attorney General, the consensual encounter complies with law and current DEA policy and is appropriately documented regardless of its investigative outcome." *Id.*

ARGUMENT

I. The DEA Administrator's Order Ending DEA's Transportation Interdiction Program Renders Count III Moot.

"Under Article III, section 2 of the U.S. Constitution, federal judicial power extends only to cases or controversies." *United States v. Gov't of Virgin Islands*, 363 F.3d 276, 284 (3d Cir. 2004). "Article III's 'case or controversy' requirement prevents federal courts from deciding cases that are moot." *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 698 (3d Cir. 1996); *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974) ("The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."). Cases are moot when "developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief." *Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017); *see also Blanciak*, 77 F.3d at 698 (same). "The central question of all mootness problems is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." *In re Surrick*, 338 F.3d 224, 230 (3d Cir. 2003). As explained below, meaningful relief is no longer possible for Count III and none of the exceptions to mootness apply, requiring dismissal of that count without prejudice.

a. The DEA Administrator's Termination Of The Broader Transportation Interdiction Program Prevents This Court From Granting Meaningful Relief.

Because Plaintiffs challenge a purported policy allegedly employed within a subpart of a broader program that has since been terminated at the direction of the DEA Administrator, this Court cannot grant meaningful relief as to Count III and that count should be dismissed as moot. As detailed *supra* Background § II, the DEA Administrator on January 8, 2025, "directed the Operations Division to immediately cease the [transportation interdiction] program and to work with Special Agents in Charge to redeploy those resources." Resar Decl., Ex. A at 2. And this followed a memorandum from the Deputy Attorney General that "ordered the suspension of all consensual

encounters conducted as part of the program." *Id.* at 1; *see also* Resar Decl., Ex. B. The purported policies and practices that Plaintiffs challenge are allegedly a facet of that broader transportation interdiction program—the seizures of travelers at U.S. airports based on suspicions related to carrying cash and the seizure of cash without probable case from travelers at U.S. airports. 1st Am. Compl. ¶¶ 505, 508. Accordingly, the alleged practices and policies that Plaintiffs challenge (assuming *arguendo* that they ever existed) have now been terminated by direction of the Administrator of the DEA, following their suspension by direction of the Deputy Attorney General.

The suspension and then termination of the broader program that Plaintiffs challenge constitutes a change in circumstance that precludes the Court from granting meaningful relief. The Court cannot enjoin alleged policies and practices that, if they ever existed, have already been terminated. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 260 (3d Cir. 2007) ("Since the Plan superseded the Ordinance in all relevant respects, its enactment has mooted Lighthouse's claims for injunctive relief based on the facial invalidity of the Ordinance."). At most, this Court could issue an injunction requiring that DEA agents conduct any future seizures in accordance with the Fourth Amendment. But where "[t]here is no continuing conduct for the Court to declare unconstitutional, an injunction that simply directs a defendant to obey the law is improper," and the "claims are moot." *Mayer v. Wallingford-Swarthmore Sch. Dist.*, 405 F. Supp. 3d 637, 642 (E.D. Pa. 2019). In any event, such an injunction would be entirely redundant with the Administrator's directive, which specified that, "[i]f an exigent circumstance arises in which it would be appropriate to conduct a consensual encounter that otherwise would be prohibited, such an encounter may be approved by the Administrator provided prompt notice is given to the Office of the Deputy Attorney General, *the consensual encounter complies with law* and current DEA policy and is appropriately documented." Resar Decl., Ex. A. at 2 (emphasis added). "In other words, there is no continuing conduct for this Court to enjoin," and Plaintiffs' request for injunctive relief is therefore moot. *Diamond v. Pa. State Educ. Ass'n*, 399 F. Supp. 3d 361, 386 (W.D. Pa. 2019), *aff'd,* 972 F.3d 262 (3d Cir. 2020); *see also Hamilton*, 862 F.3d at 335 (holding moot a case in which father sought injunctive and

declaratory relief from an alleged conspiracy to deprive him of contact with his son because father regained custody of his son).

Nor can the Court provide meaningful declaratory relief given the Administrator's termination of the program, including the challenged practices. In the context of a claim for declaratory relief, "a plaintiff must be seeking more than a retrospective opinion that he was wrongly harmed by the defendant." *Mollett v. Leicth*, 511 F. App'x. 172, 174 (3d Cir. 2013); *see also Jordan v. Sosa*, 654 F.3d 1012, 1025 (10th Cir. 2011) (same); *Save Long Beach Island v. U.S. Dep't of Com.*, 721 F. Supp. 3d 317, 338-39 (D.N.J. 2024) ("Plaintiffs' proposed relief would have the Court enter a judgment that would have no meaningful effect, as the ITAs no longer apply to the Defendants. The proposed relief would to an 'advisory opinion on abstract propositions of law.'"). But here, only a retrospective opinion could be stated because the purported policies and practices relate exclusively to a now-terminated broader program.

"In other words, there is no continuing conduct for this Court to enjoin or declare unconstitutional." *Diamond*, 399 F. Supp. 3d at 386. Because Plaintiffs seek no other form of relief pursuant to Count III, that count should be dismissed as moot. *Khodara Env't, Inc. ex rel. Eagle Env't L.P. v. Beckman*, 237 F.3d 186, 194 (3d Cir. 2001) (Alito, J.) ("Simply put, a declaration of unconstitutionality or injunction directed against the objectionable features of the 1996 Amendment would serve no purpose today.").

Two sets of cases recently resolved by the Third Circuit illustrate the point. The first concerned multiple challenges to COVID-19-related restrictions implemented through executive orders by New Jersey's governor. *Clark v. Governor of N.J.*, 53 F.4th 769 (3d Cir. 2022). In those cases, like here, plaintiffs challenged a portion of an alleged executive action that was rescinded or terminated after litigation began. *See id.* at 776 ("Appellants reply that the case appears moot only because of the Governor's unilateral rescission of his COVID orders."). The Third Circuit held the challenges "facially moot" because "[t]he relevant portions of" the challenged executive orders "were rescinded

by Governor Murphy; thus, there is no 'effectual relief whatsoever' that this Court may grant in relation to those orders." *Id.* The same is true here.[4]

Likewise, in *Hartnett v. Pennsylvania State Education Association*, 963 F.3d 301 (3d Cir. 2020), the Third Circuit considered whether a challenge to local unions deducting union fees from paychecks of non-members pursuant to a Pennsylvania state statute was moot when the union ceased that practice following the Supreme Cout's decision invalidating another state's similar statute in *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018). The Third Circuit held that those challenges were moot because, "[o]nce the Supreme Court changed course in *Janus*, the unions immediately stopped collecting agency fees" and "have forsworn collecting fees from nonmembers." *Hartnett*, 963 F.3d at 307. Accordingly, the Court held that "the lack of any continuing injury to the teachers . . . makes the case moot," such that "any declaratory judgment would be an advisory opinion." *Id.* at 308; *see also Mayer*, 405 F. Supp. 3d at 641-42 ("Since *Janus* was decided, numerous courts have ruled that cases similar to this one are moot once the dues collection has ended.") (collecting authorities). The same is true here: Count III also challenges a purported practice that would necessarily have been terminated by directive of the relevant legal authority—here, the DEA Administrator and Deputy Attorney General rather than the Supreme Court. Thus, as in *Hartnett*, the count is moot.

b. The Voluntary-Cessation Exception to Mootness Does Not Apply.

"The voluntary-cessation exception applies when a defendant ceases the allegedly illegal conduct that caused the injury but remains 'free to return to his old ways.'" *Gulden v. Exxon Mobil Corp.*, 119 F.4th 299, 308 (3d Cir. 2024). Under that exception, where a defendant asserts mootness based on voluntary conduct of the defendant, a case is "moot if subsequent events made it absolutely

[4] Other courts in this Circuit adjudicating challenges to since-rescinded or terminated COVID-19-related restrictions reached the same conclusion. *See Cnty. of Butler v. Governor of Pa.*, 8 F.4th 226, 230 (3d Cir. 2021) (holding that expiration of COVID-19-related directives rendered moot challenge to those directives); *Wood v. Palace Ent.*, No. 2:20CV1029, 2023 WL 2691439, at *1 (W.D. Pa. Mar. 29, 2023) ("Several federal courts across the country, including the United States Court of Appeals for the Third Circuit, have been presented with similar disputes relating to COVID-19 restrictions that have since been lifted. These courts ultimately determined that the challenges to these restrictions were no longer justiciable.") (collecting authorities); *Pletcher v. Giant Eagle Inc.*, No. CV 2:20-754, 2022 WL 17488019, at *7 (W.D. Pa. Dec. 7, 2022) (similar).

clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.,* 528 U.S. 167, 189 (2000)). Although that is a "heavy" burden for the defendant to bear, *Hartnett*, 963 F.3d at 307, that burden is reduced for government entities because courts "generally presume that government officials act in good faith, and we will not depart from that practice under these circumstances." *Cnty. of Butler*, 8 F.4th at 230; *see also Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd sub nom. Sossamon v. Texas*, 563 U.S. 277 (2011) ("[C]ourts are justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude, mooting cases that might have been allowed to proceed had the defendant not been a public entity . . . . Without evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing.").

Defendants readily carry their burden here. As an initial matter, courts in voluntary-cessation cases consider "the timing of and reason for" a defendant's cessation of the challenged conduct to assess whether the change in policy was a result of plaintiff's litigation. *Diamond*, 399 F. Supp. 3d at 390-91. Here, both the timing of and reason for the DEA Administrator's order demonstrate that the change in policy was not driven by the instant litigation and that the challenged policies will therefore not be reinstated once the case is dismissed. This case was first filed over five years ago on January 15, 2020 (*see* Compl., ECF No. 1), and the Court allowed Count III to proceed past the motion-to-dismiss stage nearly four years ago on March 30, 2021 (*see* Order, ECF No. 78). DEA then proceeded through four years of discovery, producing thousands of pages of documents and several witnesses for depositions. If DEA were terminating the challenged conduct in response to this action, it presumably would have done so long ago to avoid five years of time-intensive litigation. Nor, if the decision as driven by the instant litigation, would DEA have terminated the entire transportation interdiction program, which encompasses more than the seizures at issue in this action. Instead, as the DEA Administrator explained in its directive, the program was terminated because "[a]fter reviewing data and the operating cost of the TIP and comparing it to our traditional investigations, it

became clear that the TIP is not an effective way to utilize our limited resources." Resar Decl., Ex. A at 2.

Moreover, DEA's termination order issued after the Deputy Attorney General ordered on November 12, 2024, "that the DEA suspend conducting consensual encounters pursuant to the program." Resar Decl., Ex. B at 1. And the Deputy Attorney General's suspension memorandum was issued following "[i]nternal and ongoing reviews by the Department of Justice, [DEA], and Office of Inspector General," not this lawsuit. *Id.* This, too, weighs against application of the voluntary-cessation exception. *Hartnett*, 963 F.3d at 307 ("[I]f the defendant ceases because of a new statute or a ruling in a completely different case, its argument for mootness is much stronger."); *see also Clark*, 53 F.4th at 778 ("[W]e are generally less skeptical of voluntary cessation claims where the change in behavior was unrelated to the relevant litigation."); *Marcavage*, 666 F.3d at 861 ("In the case before us, in contrast, the Park Service did not revise its position on demonstrations on the Sixth Street sidewalk in reaction to this civil rights action."). Accordingly, "the timing of and reason for" Defendants' cessation of the challenged conduct "make it clear that . . . Defendants did not cease the challenged conduct due to this litigation," supporting a finding of mootness. *Diamond*, 399 F. Supp. 3d at 390-91.

That the Administrator's termination of the transportation interdiction program "has no end date, and . . . applies year-round" also refutes any suggestion that the DEA will reinstate the challenged policies and practices. *Knights of Columbus Star of Sea Council 7297 v. City of Rehoboth Beach, Del.*, 506 F. Supp. 3d 229, 237 (D. Del. 2020); *id.* ("Fundamentally, the Court sees no prospect that the City will return to the November 2020 Policy, much less to an anti-religious-displays policy that the City insists never even existed."). Indeed, the Administrator's directive provides even greater assurance that the challenged conduct will not be reinstated than the revised policy held sufficient to establish mootness in *Knights of Columbus* because it directs "the Operations Division to immediately cease the [transportation interdiction] program and *to work with Special Agents in Charge to redeploy*" the resources allocated for the transportation interdiction program "to global supply chain and illicit finance investigations." Resar Decl., Ex. A at 2 (emphasis added).

Defendants anticipate that Plaintiffs may fault DEA for not disavowing in this litigation its past policy, and that they may argue that the absence of an express disavowal supports an inference that the alleged policies and practices they challenge may be reinstated. But this case is readily distinguishable from those, such as *Virgin Islands*, 363 F.3d at 284, in which a defendant's vigorous defense of the prior challenged policy supported the possibility that the challenged policy would be reinstated and thus weighed against a finding of mootness. Most "importantly, unlike in *Virgin Islands*, . . . here there is a dispute as to whether the challenged 2018 and 2019 policy ever even existed (or continues to exist). The [defendant] denies that it ever had the [challenged] policy the [plaintiff] criticizes." *Knights of Columbus*, 506 F. Supp. 3d at 236-37. Indeed, DEA has consistently denied that it has any policy or practice of conducting seizures in violation of the Fourth Amendment. *See, e.g.*, Defs.' Obj. to Mag. Judge's Recommendation at 10, ECF No. 72 ("Plaintiffs have failed to plausibly allege that . . . DEA adopted policies that violated Fourth Amendment protections from unreasonable seizures."); *id.* at 14 ("[T]he existence a DEA interdiction program at many U.S. airports does not support an inference that DEA has an unconstitutional seizure policy."). Accordingly, DEA's defense in this case is not the type of defense that suggests the alleged prior practice or policy will be reinstated. *Knights of Columbus*, 506 F. Supp. 3d at 237 ("In the circumstances presented here, then, the City's refusal to 'disavow' what it contends is (and always was) a non-existent policy does not support a conclusion that the City is likely to resume its alleged past practices.").

In any event, even if Plaintiffs could establish that some future transportation interdiction program may be created, that possibility would be insufficient to maintain a live case or controversy. "Rather, the hypothesized [reinstatement] must be 'similar enough to the [original policy] to present substantially the same legal controversy as the one presented' here." *Clark*, 53 F.4th at 777. Here, there is no reason to believe that a reinstated transportation interdiction program would operate under the same policies as a program that was at first suspended and then terminated, let alone that it would include the alleged policies and practices challenged by Plaintiffs. *See id.* at 781 ("[E]ven assuming a reasonable likelihood of *some* COVID-based gathering restriction returning, it is implausible that a challenge to that restriction would constitute the *same legal controversy* as the one before us now."); *Pletcher*

v. Giant Eagle Inc., No. CV 2:20-754, 2022 WL 17488019, at *7 (W.D. Pa. Dec. 7, 2022) ("Third, the voluntary cessation exception does not save Plaintiffs' federal claims because there is no evidence before the Court indicating that 'substantially the same legal controversy' is reasonably likely to recur in the future."). Indeed, the Deputy Attorney General's memorandum states that the program could be "restarted only when its utility has been properly evaluated and assessed—and *appropriate policies and training have been implemented,*" Resar Decl., Ex. B at 2 (emphasis added), making clear that future policies and training would be expected to differ from past policies and training materials.

At bottom, Plaintiffs can offer no more than speculation that a future DEA Administrator could reinstate some sort of transportation interdiction program, and that the challenged seizures would recur under similar policies to those that previously existed. The voluntary-cessation exception "require[s] more than speculation that a challenged activity will be resumed." *Thompson v. U.S. Dep't of Labor*, 813 F.2d 48, 51 (3d Cir. 1987); *see also Solid Rock Baptist Church v. Murphy*, 555 F. Supp. 3d 53, 61 (D.N.J. 2021) (same); *Eden, LLC v. Justice*, 36 F.4th 166, 172 (4th Cir. 2022) ("[A] governor's mere ability to reimpose challenged restrictions is not enough to show a reasonable chance of recurrence."). As the Third Circuit explained in *Clark*, "we need not hypothesize further about what a renewed . . . regime . . . might look like. The point is that the very possibility of such renewed restrictions is itself speculative, and an analysis of the legal status of such hypothesized rules doubly-so." 53 F.4th at 781. Accordingly, the voluntary-cessation exception does not apply in this case, and the proper course is dismissal without prejudice.

II. Even If Count III Were Not Constitutionally Moot, Prudential Mootness Considerations Compel Dismissal.

Prudential grounds justify dismissing Count III even if the Court does not find constitutional mootness. Plaintiffs seek only "declaratory and injunctive relief . . . to remedy DEA's" allegedly "unlawful policies and practices." 1st Am. Compl. ¶ 516. And in the Third Circuit, "[t]he discretionary power to withhold injunctive and declaratory relief for prudential reasons, even in a case not constitutionally moot, is well established." *Blanciak*, 77 F.3d at 700 (quoting *S–1 v. Spangler*, 832 F.2d 294, 297 (4th Cir. 1987)). "Under the prudential mootness doctrine," courts "decline to exercise [their]

discretion to grant declaratory and injunctive relief if the controversy is 'so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 277 F. App'x 170, 172 (3d Cir. 2008) (quoting *Chamber of Com. v. U.S. Dep't of Energy,* 627 F.2d 289, 291 (D.C. Cir. 1980)). "The key inquiry in a prudential mootness analysis is 'whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief.'" *Marcavage*, 666 F.3d at 862 n.3.

That inquiry compels dismissal here. As explained *supra* Background § II, the DEA Administrator's termination of the broader transportation interdiction program necessarily ends the alleged policy and practice of conducting non-consensual seizures of travelers at U.S. airports and seizing cash without probable cause. Accordingly, any declaratory or injunctive relief that this Court issues regarding that alleged policy and practice would have no effect, and this case is prudentially moot. *Sierra Club*, 277 F. App'x at 173 ("Because the substantially complete fill forecloses the opportunity for any meaningful relief to Plaintiffs' alleged injuries, we hold that this case is prudentially moot."); *Marcavage*, 666 F.3d at 862 n.3.

To the extent that the new administration is reconsidering DEA interdiction efforts, that only reinforces that this case is prudentially moot. Any new program, process, or enforcement guidance for DEA interdiction efforts would obviously result in a modification of past practice that is no longer in effect. As the Supreme Court instructed when addressing similar circumstances in *A.L. Mechling Barge Lines, Inc. v. United States*, "sound discretion withholds the [declaratory judgment] remedy where it appears that a challenged 'continuing practice' (of an administrative agency) is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted." 368 U.S. 324, 331 (1961). The Supreme Court has issued similar instruction in cases seeking injunctive relief. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953) ("We conclude that, although the actions were not moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief.").

This Court should follow the Third Circuit's guidance in *Blanciak,* which recognized three considerations—all of which are also present here—that justified dismissal of a claim for declaratory and injunctive relief on prudential mootness grounds. First, *Blanciak* emphasized that subsequent actions ensured the plaintiffs were not suffering any present injury, and the plaintiffs there "had no imminent need for a hearing on [their] entitlement to tuition reimbursement." 77 F.3d at 700. Here, too, Plaintiffs have no imminent need for judicial action because the entire transportation interdiction program has been terminated by order of the DEA Administrator, *supra* Background § II. Indeed, the prudential basis for withholding relief is even stronger here than in *Blanciak* where the case was mooted by settlement rather than a change in policies. Any decision that this Court issues on Plaintiffs' constitutional claim would concern practices and policies of DEA under a now-rescinded program. Even assuming that the broader transportation interdiction program was reinstated, there is no reason to believe that it would be reinstated under the same policies, let alone with the alleged practices and policies that Plaintiffs challenge. At most, then, this Court could issue an advisory opinion on the legality of a past DEA policy or practice. But in the context of a claim for injunctive or declaratory relief, a plaintiff must seek more than a retrospective opinion on the legality of a discontinued practice. *Chamber of Com.*, 627 F.2d at 292 (although "the court's power to grant injunctive relief survives discontinuance of the illegal conduct," "the moving party must satisfy the court that relief is needed" through a showing that "there exists some cognizable danger of recurrent violation, something more than the mere possibility") (quoting *W.T. Grant Co.*, 345 U.S. at 632-33)); *id.* ("The same principles apply when a declaratory judgment rather than an injunction is sought.").

Second, the Third Circuit in *Blanciak* emphasized that the case presented "a sensitive constitutional question," which "would be better left to a court presented with a more concrete and immediate dispute." *Id.* Plaintiffs in the instant action raise sensitive constitutional questions, such as whether all law enforcement encounters at airports are nonconsensual seizures under the Fourth Amendment, *see* 1st Am. Compl. ¶¶ 414-430. Those questions, too, should be resolved by a Court presented with a concrete and immediate dispute, not a hypothetical based on the speculative revision of an abandoned policy.

Third, the *Blanciak* court explained that the issues raised did not require "immediate resolution as 'capable of repetition yet likely to evade review.'" 77 F.3d at 700 (quoting *Spangler*, 832 F.2d at 298). That is true here, too. If DEA reinstates a broader transportation interdiction program, Plaintiffs will have the opportunity to challenge aspects of that program if and as that program will affect them going forward. *See Solid Rock Baptist Church*, 555 F. Supp. 3d at 61 ("[I]f the State enacts new restrictions in response to COVID-19 that Plaintiffs believe are violative of their rights, Plaintiffs are not without recourse. New claims could always be filed, and the Court will hear those claims, if appropriate, in due course.").

* * *

In sum, "the precise conduct that prompted this suit . . . has come to an end. The allegedly unlawful departmental practice" has not only undergone "review and may never recur," but in fact the overarching program has been terminated. *Chamber of Com.*, 627 F.2d at 292. If a future DEA Administrator does reinstate a transportation interdiction program, it is entirely speculative that a revised program would be reinstated under policies and practices like those that Plaintiffs challenge. Indeed, as discussed above, any new program under consideration would be supported by new training, new instructors, and the full consideration of the OIG's November 21, 2024 Management Advisory Memorandum. But even if the terminated interdiction program was reinstated unchanged, "there will be ample opportunity for the [plaintiffs] to renew their complaint." *Id.* Until that time, and assuming this Court declines to dismiss this case as constitutionally moot, "dismissal of this action pursuant to the court's discretionary authority to grant or withhold injunctive and declaratory relief" is the appropriate outcome. *Id.*

III. If The Court Declines To Dismiss the Claims, It Should Stay The Case As To DEA.

Count III should be dismissed because it is both constitutionally and prudentially moot. In the event the Court were to find that dismissal of the claims against DEA is not appropriate at this time, Count III should, in the alternative, be stayed pending the conclusion of the ongoing program review discussed above to avoid unnecessary expenditure of party and judicial resources. *See Destination Maternity Corp. v. Target Corp.*, 12 F. Supp. 3d 762, 766 (E.D. Pa. 2014) (a district court may,

in its discretion, stay deadlines in a case as part of the court's inherent power to conserve judicial resources by controlling its own docket.). But in no event should the Court issue an advisory opinion regarding a rescinded policy that is no longer in effect.

CONCLUSION

For the reasons set forth above, Count III should be dismissed without prejudice under Federal Rule of Civil Procedure 12(b)(1).

Dated: April 15, 2025

Respectfully submitted,

YAAKOV ROTH
Acting Assistant Attorney General

ANDREW WARDEN
Assistant Director, Federal Programs Branch

/s/ Galen N. Thorp
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REBECCA BROWN, AUGUST TERRENCE ROLIN, STACY JONES-NASR, and MATTHEW BERGER, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. TRANSPORTATION SECURITY ADMINISTRATION; ADAM STAHL, in his official capacity as Senior Official Performing the Duties of the Administrator of the Transportation Security Administration; DRUG ENFORCMENT ADMINISTRATION; DEREK S. MALTZ, in his official capacity as Acting Administrator of the Drug Enforcement Administration; UNITED STATES OF AMERICA, *Defendants*.	Civil Action No. 2:20-cv-64-MJH-KT

DECLARATION IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS

I, Alexander W. Resar, make the following Declaration pursuant to 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

1. I am a Trial Attorney with the Federal Programs Branch of the Civil Division of the United States Department of Justice and counsel for Defendants in this matter.

2. Attached as **Exhibit A** is a true and accurate copy of a memorandum issued by the Drug Enforcement Administration Administrator dated January 8, 2025, titled "Transportation Interdiction Program."

3. Attached as **Exhibit B** is a true and accurate copy of a memorandum issued by the Deputy Attorney General dated November 12, 2024, titled "Transportation Facilities Interdiction Program Directive."

4. Attached as **Exhibit C** is a true and accurate copy of Management Advisory Memorandum 25-0005, Notification of Concerns Identified in the Drug Enforcement Administration's Transportation Interdiction Activities, issued by the Department of Justice Office of Inspector General on November 21, 2024.

Executed on April 15, 2025, in Newark, New Jersey.

/s/ Alexander W. Resar
Alexander W. Resar

U.S. Department of Justice
Drug Enforcement Administration

Office of the Administrator *Springfield, VA 22152*

January 8, 2025

MEMORANDUM – VIA EMAIL

TO: William Kimbell, Chief of Operations
Hallie Hoffman, Chief Counsel
Ed Kovacs, Chief Compliance Officer
Tim Flaherty, Chief Inspector

CC: George Papadopoulos
Principal Deputy Administrator

FROM: Anne Milgram
Administrator

SUBJECT: Transportation Interdiction Program

The Inspector General recently issued a Management Advisory Memorandum on DEA's Transportation Interdiction Program (TIP)[1], and on November 12, 2024, the Deputy Attorney General (DAG) ordered the suspension of all consensual encounters conducted as part of the program pending an evaluation of the utility of such consensual encounters and a broader review of the costs and benefits of the program given DEA's priorities and limited resources. The DAG directive further indicated that the TIP may not be restarted without the DAG's explicit approval. The DAG directive further specified that consensual encounters at mass transportation facilities that are not connected to an ongoing investigation are prohibited, including encounters that are solely based on travel information from a confidential source. However, Special Agents in Charge may authorize lawful and DOJ-compliant consensual encounters at mass transportation facilities that are part of pre-planned activity relating to an ongoing investigation involving one or more identified targets or criminal networks. If a confidential source in the transportation industry is utilized in an ongoing investigation, supervisors must ensure compliance with DEA policies and the DAG directive mentioned above.

During the last several months, the Office of the Administrator has conducted a review of DEA's TIP during which we evaluated the program's effectiveness, assessed the risks of continuing the TIP, and the extent to which it supports our core mission - to save lives by defeating the two criminal networks in Mexico, the Sinaloa and Jalisco cartels, which are responsible for the deadliest drug threat our country has ever faced. To meet this unprecedented moment and be most effective, we are focused on targeting entire criminal networks and disrupting their global supply chain. Our strategy is working – the number of people that died from drug poisoning is down for the first time in 5 years and the toxicity of fentanyl in seized pills has also dropped for the first time since 2021 – but we must continue to evolve to meet the threats we face today and those that we will face in the future.

[1] Management Advisory Memorandum, 25-005, Notification of Concerns Identified in the Drug Enforcement Administration's Transportation Interdiction Activities, November 2024, identifying concerns with use of consensual encounters unconnected to an existing investigation of individuals at mass transportation facilities.

Our comprehensive internal review looked at data from across the agency, including drug and money seizures and arrests at mass transportation facilities. After reviewing this data and the operating costs of the TIP and comparing it to our traditional investigations, it became clear that the TIP is not an effective way to utilize our limited resources. For example, from 2022-2024, TIP seizures totaled approximately $22 million in drug proceeds and resulted in a total of 57 arrests. During the same timeframe, our predicated investigations focused on criminal networks, illicit financing, etc., seized more than $1.4 billion and arrested thousands of individuals. Global criminal networks, like the Sinaloa and Jalisco Cartels, have expanded their money laundering methods, and today increasingly use cryptocurrency. The internal review also found that we did not fully comply with DEA TIP policy, including to document all consensual encounters when they occurred.

Based on the internal review and after considering the potential risks of continuing the TIP, I have directed the Operations Division to immediately cease the program and to work with Special Agents in Charge to redeploy those resources to global supply chain and illicit finance investigations. The Operations Division and Office of Training will also increase our focus on illicit finance, global money laundering to new methods, including, cryptocurrency investigations.

If an exigent circumstance arises in which it would be appropriate to conduct a consensual encounter that otherwise would be prohibited, such an encounter may be approved by the Administrator provided prompt notice is given to the Office of the Deputy Attorney General, the consensual encounter complies with law and current DEA policy and is appropriately documented regardless of its investigative outcome.

I am confident that DEA will continue to save lives and achieve our strategic objectives by strengthening our network targeting strategy focused on the global supply chain, illicit finance, and cryptocurrency investigations.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

November 12, 2024

MEMORANDUM FOR ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION

FROM: THE DEPUTY ATTORNEY GENERAL

SUBJECT: Transportation Facilities Interdiction Program Directive

Internal and ongoing reviews by the Department of Justice, Drug Enforcement Administration (DEA), and Office of Inspector General have identified concerns with DEA's use of consensual encounters unconnected to an existing investigation with individuals at mass transportation facilities as part of the DEA's broader transportation interdiction activities ("transportation facilities interdiction program" or "program"). These reviews have prompted the need for a broader review of the costs and benefits of the program, including whether it remains effective and useful given DEA's priorities and limited resources.

Until the utility of conducting consensual encounters pursuant to the transportation interdiction facilities program is evaluated, assessed, and identified concerns are sufficiently addressed, I am directing that the DEA suspend conducting consensual encounters pursuant to the program, subject to my further review following the assessment and evaluation. Consensual encounters pursuant to the program may not be resumed absent explicit direction from the Deputy Attorney General.

While suspending consensual encounters pursuant to the program is intended to prohibit consensual encounters unconnected to another investigation, it is not intended to prohibit other consensual encounters in which DEA Special Agents (agents) and task force officers (TFOs) may engage. For example, with approval from the Special Agent in Charge (SAC) of the Field Division, agents and TFOs still may conduct lawful and DOJ policy-compliant consensual encounters with individuals at transportation facilities as part of a pre-planned activity in an ongoing, predicated investigation involving one or more identified targets or criminal networks. Note that the receipt of travel information from a confidential source, standing alone, does not constitute the type of predicated, ongoing investigation which will support a consensual encounter under this Directive unless the travel information has a nexus to a predicated investigation and the requisite SAC approval is obtained. At the same time, if an exigent circumstance arises in which it would be appropriate to conduct a consensual encounter that otherwise would be prohibited under this directive, such an encounter may be approved by the DEA Administrator provided prompt notice is given the Office of the Deputy Attorney General, the consensual encounter complies with law and current DEA policy, and the consensual encounter is appropriately documented regardless of its investigative outcome.

Consensual encounters are an important tool used by law enforcement in the investigation of potential criminal conduct. When used appropriately, these encounters advance the interests of public safety and help ensure those encountered are kept safe and treated with the respect and dignity every individual has the right to expect when engaging with members of law enforcement. By suspending the use of consensual encounters pursuant to DEA's transportation interdiction facilities program and authorizing it to be restarted only when its utility has been properly evaluated and assessed — and appropriate policies and training have been implemented — we help ensure that the Department is fulfilling its mission to keep the American people safe, protect civil rights, and uphold the rule of law.

DEPARTMENT OF JUSTICE | OFFICE OF THE INSPECTOR GENERAL

MANAGEMENT ADVISORY MEMORANDUM

25-005

NOVEMBER 2024

Notification of Concerns Identified in the Drug Enforcement Administration's Transportation Interdiction Activities

EVALUATION AND INSPECTIONS DIVISION

DEPARTMENT OF JUSTICE | OFFICE OF THE INSPECTOR GENERAL

November 21, 2024

Management Advisory Memorandum

To: Lisa Monaco
Deputy Attorney General

Anne Milgram
Administrator
Drug Enforcement Administration

From: Michael E. Horowitz
Inspector General

Subject: Notification of Concerns Identified in the Drug Enforcement Administration's Transportation Interdiction Activities

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The purpose of this memorandum is to bring to your immediate attention serious concerns identified by the U.S. Department of Justice (Department, DOJ) Office of the Inspector General (OIG) during our ongoing oversight of the Drug Enforcement Administration's (DEA) transportation interdiction activities. The OIG's oversight includes an evaluation of the DEA's transportation interdiction activities and a separate ongoing OIG investigation, both of which were initiated earlier this year. This memorandum also follows prior OIG audits, reviews, and investigations that have identified significant issues with the DEA's use of consensual encounters at transportation facilities and its management of its confidential source (CS) program, all of which have informed the analysis and recommendations in this memorandum.

The OIG recently identified that, during its transportation interdiction activities, the DEA was not complying with its own policy on consensual encounters conducted at mass transportation facilities, resulting in personnel creating potentially significant operational and legal risks. Specifically, the DEA was not complying with DEA policy to complete the DEA-177 Consensual Encounter Form (DEA-177 form) for each consensual encounter, despite prior DEA representations to the OIG that the DEA was doing so. Additionally, the DEA was not ensuring that all DEA task force personnel complete interdiction training required by DEA policy, despite the DEA's prior representations to the OIG that the DEA would do so, resulting in personnel conducting interdiction activities at transportation facilities without first receiving the required training.

In our view, and as described in detail below, proceeding with such interdiction activities in the absence of critical controls, such as adequate policies, guidance, training, and data collection, creates substantial risks that DEA Special Agents (SA) and Task Force Officers (TFO) will conduct these activities improperly; impose unwarranted burdens on, and violate the legal rights of, innocent travelers; imperil the Department's asset forfeiture and seizure activities; and waste law enforcement resources on ineffective interdiction actions.

On November 12, 2024, after receiving a draft of this Management Advisory Memorandum (MAM), the Deputy Attorney General issued a directive to the DEA to suspend conducting, pending an assessment and evaluation, all consensual encounters at mass transportation facilities unless they are either connected to an existing investigation or approved by the DEA Administrator based on exigent circumstances. We describe that directive below and provide it in Appendix 1.

Prior OIG Reports and Findings Concerning the DEA's Interdiction Activities at Transportation Facilities

The Department has long been concerned—and long received complaints—about potential racial profiling in connection with cold consent encounters in transportation settings. In response to concerns about possible racial profiling by federal law enforcement agencies, between 2000 and 2003, following a June 1999 directive by then President Bill Clinton, the DEA collected consensual encounter data on every encounter in certain mass transportation facilities as part of a Department pilot project to examine the use of race in law enforcement operations. Neither the DEA nor the Department drew any conclusions from the data collected about whether the consensual encounters were being conducted in an unbiased manner, and in 2003 the DEA terminated its data collection efforts. However, its consensual encounter activities continued.

More than 10 years later, after receiving separate racial profiling complaints from two African American women resulting from their "cold consent encounters" with DEA task force members on an airport jetway, the OIG found in a 2015 report that the DEA still did not collect sufficient data on these cold consent encounters to assess whether they were being conducted impartially.[1] Specifically, we found that DEA Task Force Groups (TFG) had not collected information about each of the consent encounters they had conducted since 2003 and that, when TFGs did document an encounter—when they made a seizure or made an arrest—they did not systematically collect demographic information. Additionally, we determined that, although the DEA had directed TFG managers and new SAs and TFOs to receive required transportation interdiction training (known as "Operation Jetway" training), the DEA had not ensured that training and operational requirements were clearly established, communicated to TFG members, or followed. Our 2015 report therefore recommended that the DEA develop a way to track all cold consent encounters and their results and that it require that TFG members and supervisors attend Jetway training or alternative DEA-approved interdiction training. The DEA concurred with, and agreed to implement, both recommendations.

The OIG also addressed the issue of the DEA's transportation interdiction activities in two subsequent oversight reports that identified significant concerns with the DEA's management and oversight of its CSs and with its cash seizure and forfeiture activities. In a 2016 audit of the DEA's CS Program, which included a review of CSs in transportation settings, the OIG found that the DEA did not adequately oversee payments to its sources and that SAs gave instructions and guidance to Limited Use CSs, often referred to as "tipsters," which DEA policy specifies are sources who "must provide information independently, i.e., without 'direction' from DEA." Our audit found that the DEA's actions tested the boundaries of "Limited Use" and what it

[1] A cold consent encounter is a method of consensual encounter during which an officer approaches an individual and asks for consent to speak with them. As defined in our 2015 report, a cold consent encounter can occur when an officer approaches an individual based on no particular behavior, or based on the officer's perception that the individual is exhibiting characteristics indicative of drug trafficking, without any independent predicating information. The encounter typically entails the officer asking for consent to speak with the individual and, if the officer thinks it warranted, seeking consent to search their belongings. See DOJ OIG, *Review of the Drug Enforcement Administration's Use of Cold Consent Encounters at Mass Transportation Facilities*, Evaluation and Inspections (E&I) Report 15-3 (January 2015), oig.justice.gov/reports/review-drug-enforcement-administrations-use-cold-consent-encounters-mass-transportation.

means to provide information "without direction."[2] For example, we found that DEA SAs had recruited and established multiple commercial airline employees as Limited Use CSs and these airline employees had provided DEA SAs with passenger travel information, including flight, itinerary, and ticket information. Our audit also found that some DEA SAs requested that CSs provide them with suspicious travel itineraries that met criteria defined by the DEA SAs. The report found that the DEA appeared to have recruited certain sources we examined to act on behalf of, or in partnership with, the DEA and that the sources participated in these activities with an expectation of receiving potentially significant compensation.

In a 2017 OIG review of the Department's oversight of its cash seizure and forfeiture activities, we found that the Department and its investigative components, including the DEA, did not fully evaluate and oversee their seizure and forfeiture activities because the Department did not formally collect or evaluate the necessary data.[3] Our analysis of a sample of DEA cash seizures, most of which occurred in transportation interdiction settings and had characteristics that we believed made them susceptible to civil liberties concerns, found that the DEA conducted cash seizures that did not always advance or relate to criminal investigations. We also found that most of these seizures were initiated based on observations and immediate judgments of DEA SAs and TFOs, without preexisting intelligence of a specific drug crime. The report further found that the DEA did not require TFOs to receive training on federal asset seizure and forfeiture laws prior to conducting federal seizures.

In 2016, the DEA provided the OIG documentation representing that it required all task force members and supervisors participating in interdiction activities to attend Operation Jetway training, in response to a recommendation made in the OIG's 2015 cold consent encounters report. Based on the OIG's review of this documentation and additional training records provided by the DEA in 2017, the OIG determined that the DEA had addressed the OIG's recommendation and closed it. The DEA Agents Manual now provides, in Section 6655B: "All DEA personnel (SAs/TFOs) participating in drug interdiction units at mass transportation facilities are required to attend and complete the [Operation Jetway] training."

By 2022, the DEA had provided the OIG documentation showing that it had, among other things, developed a required "Consensual Encounter" form (known as the DEA-177 form) to document all consensual encounters, including cold consent encounters, at mass transportation facilities, including demographic information about the travelers, and that it had developed a way to use that information to gain a better understanding of whether and under what circumstances cold consent encounters are an effective use of law enforcement resources. The DEA Agents Manual now requires in Section 6655D that all consent encounters at mass transportation facilities be documented by completing a DEA-177 form. Based on the information submitted by the DEA, and the OIG's review of it, the OIG determined that the DEA had addressed the OIG's recommendation and closed it.

The Issue

In response to various recent allegations, and to follow up on our 2015 cold consent encounters report, earlier this year the OIG initiated an evaluation of the interdiction activities of the DEA at transportation centers, including its use of seizures and consensual encounters, as well as the data collection and tracking of such activities. The OIG's current oversight work, including the evaluation and a separate ongoing

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[2] DOJ OIG, *Audit of the Drug Enforcement Administration's Management and Oversight of Its Confidential Source Program*, Audit Report 16-33 (September 2016), oig.justice.gov/reports/audit-drug-enforcement-administrations-management-and-oversight-its-confidential-source.

[3] DOJ OIG, *Review of the Department's Oversight of Cash Seizure and Forfeiture Activities*, E&I Report 17-02 (March 2017), oig.justice.gov/reports/review-departments-oversight-cash-seizure-and-forfeiture-activities.

investigation, has recently identified several serious concerns about the DEA's interdiction activities in transportation settings.[4]

First, during the investigation, we learned of a DEA office that has a Limited Use CS, who is an employee of a commercial airline, and has for several years been paying the CS a percentage of forfeited cash seized by the DEA office from passengers at the local airport when the seizure resulted from information the CS had provided to the DEA. Specifically, we learned that for the past several years this CS has sent the DEA office information from the airline's reservation system identifying passengers who purchased tickets to certain U.S. cities within 48 hours of the travel so that the DEA could, among other things, approach those passengers at the airport and seek their consent to search their carry-on luggage. During consensual encounters, passengers have the right to decline to engage with the DEA SAs or TFOs or have their bag searched. If the law enforcement officer does not already possess at least a reasonable suspicion that a crime has been or is being committed, the law enforcement officer lacks the necessary legal basis to detain the passenger or their property.

As an example of the DEA's use of this CS, earlier this year, in the early morning, the DEA office received from the CS a list of five such individuals traveling to a major U.S. city and commercial hub on a domestic flight, operated by the CS's employer, that was scheduled to leave approximately 3 hours later. DEA SAs and TFOs at the local airport planned to approach the travelers whose names appeared on the list—after those travelers had passed through airport security and while they were in the process of boarding their flight—to have a consensual encounter with them. Based on the OIG's prior work in this area, such consensual encounters may include a request that a traveler consent to a search of their belongings, if the SA or TFO thinks it warranted. Our investigators were told that, after receiving the list and prior to approaching the travelers, the DEA ran checks for prior criminal records. None of the five had a prior relevant criminal history. Thus, any consensual encounter would have been based solely on the fact that within the previous 48 hours they had purchased tickets, some of which were one way, to fly to a major U.S. city that is a significant business center. The DEA had no additional information to suggest that these five passengers might be engaged in illegal activity.

As one of the five travelers was boarding their flight, the traveler was approached by a DEA TFO, who decided to detain the traveler's carry-on bag after the traveler did not consent to a search.[5] The DEA TFO advised the traveler that he was detaining the bag, but he told the traveler that they were free to board the plane without the bag. The traveler ultimately decided to remain with the bag. Thereafter, a law enforcement drug-detection dog, according to the DEA, alerted to the bag. The DEA TFO then told the traveler that they could either consent to the search of the bag or the DEA would detain it further and seek a search warrant. The passenger eventually told the DEA that it could search the carry-on bag and signed a consent form. No cash, drugs, or other contraband was found when the DEA searched the bag, and the bag was returned to the traveler. By that time, the traveler had missed their original flight. The traveler made a video and audio recording of this encounter on a personal recording device, and an edited version of the video and audio has been made public.

During our ongoing investigation, we found that, contemporaneously with this incident, the DEA did not prepare any paperwork other than the traveler's signed consent-to-search form (there was no DEA-177 form completed). We found that the DEA did so months later, only after details of the encounter with this

[4] While our investigation remains open, the concerns we describe and the recommendations we make in this MAM complete our evaluation.

[5] In light of the OIG's ongoing investigation, the description of this incident in this MAM does not include all of the details of which the OIG is aware, but only those that are directly relevant to this MAM.

traveler became public. None of the members of the DEA TFG were wearing a body-worn camera, which is not required by any DEA or Department policy and is consistent with the practice of another DEA TFG that we reviewed as part of our evaluation. Consequently, this traveler currently holds the only known video and audio recording of substantial portions of this encounter, leaving the DEA without an important record of the interaction as it and the OIG attempt to assess what occurred.

The OIG has learned that, due to the delay caused by this traveler's initial refusal to consent to the search of their carry-on bag, the DEA was unable to have consensual encounters with all of the other travelers whose names were on the list provided by the CS. The OIG investigation has been unable to determine exactly how many other passengers on the list had consensual encounters with the DEA that day, and/or how many searches may have been conducted of them, because there are no completed DEA-177 forms and no seizures or arrests were made, which would have necessitated DEA paperwork to be completed.

The OIG's review of DEA records revealed that the CS who provided the information to the DEA task force that day has received tens of thousands of dollars from the DEA over the past several years for seizures resulting from information the CS provided of travelers with tickets purchased within 48 hours of their flight. We are unable to determine the total number of travelers the DEA has searched over the years as a result of information provided by the CS, or the number who have refused to be searched following consensual encounters with the DEA at the local airport, because the DEA office in question kept records of such interactions only when they resulted in a seizure of money or contraband.

We believe that the information our investigation has uncovered thus far regarding the DEA's transportation interdiction activities at this airport illustrates several potentially significant—and in many cases longstanding—systemic issues and possible legal risks. Among them are whether the DEA's multiyear payments to a Limited Use CS could result in a finding that the CS is acting as an agent of the DEA, thereby rendering the CS a government actor for Fourth Amendment purposes. It also raises questions as to whether CSs employed by private transportation companies may be violating state law by providing passenger data to the DEA (in the absence of a subpoena) in the increasing number of states that tightly regulate business use of consumer data. Additionally, Limited Use CSs provide information to the DEA without direction about suspicious activity or behavior that could be indicative of criminal activity. This raises the question of whether DEA policy intends for the Limited Use CS category to include airline employees who provide to the DEA, with some regularity, lists of travelers who purchase tickets within 48 hours for flights to certain major metropolitan U.S. cities, without any further suspicion about those passengers. We note that it is hardly unusual for travelers, including business travelers and last-minute vacationers, to purchase tickets within 48 hours of a flight. We also believe that the DEA and the Department need to consider whether approaching airline passengers to request consent to search their carry-on bag as they are approaching the jetway to board their soon-to-be departing flight could be viewed as placing undue pressure on travelers to accede to such requests.

Further, the DEA's failure to collect data for each consensual encounter, as required by its own policy, and its continued inability to provide us with any assessment of the success of these interdiction efforts once again raise questions about whether these transportation interdiction activities are an effective use of law enforcement resources—and leaves the DEA once again unable to provide adequate answers to those questions.

Second, consistent with the practice of the DEA office in the airport interdiction incident described above, and despite the DEA's prior commitment in response to our 2015 recommendations to document each of its consensual encounters in transportation facilities, we learned during our current evaluation of failures by DEA offices that conduct interdiction at other transportation facilities to comply with the DEA Agents Manual requirement to timely complete a DEA-177 form following a consensual encounter with a traveler.

Specifically, in addition to the encounters at the airport described above, which had no associated DEA-177 forms, our evaluation work has revealed that at least two additional TFGs at other airports did not complete a DEA-177 form following each consensual encounter they conducted. An Assistant Special Agent in Charge who oversaw one of these TFGs explained that until August 2024 he was not aware of the requirement to complete the DEA-177 form. The use of this form is important because it can help the DEA assess whether its consensual encounter activities are an efficient and effective use of law enforcement resources and whether there is evidence of racial profiling in its use of these activities.[6]

Even for instances in which DEA-177 forms were completed, we learned of other issues. For example, although the DEA Agents Manual requires submission of the DEA-177 form on the day of the encounter, we were told of DEA-177 forms that had only recently been submitted (after the OIG's evaluation had been announced) for consensual encounters that were conducted months prior. There were also numerous examples in which DEA-177 form data was incomplete, which risks limiting the DEA's ability to rely on such data to assess its activities. In addition, our interviews with some TFG personnel and Field Division leadership identified confusion about the DEA-177 form. Specifically, the form, which is labeled "Consensual Encounter Form," has a drop-down menu to respond to the question about the "Basis for the Encounter" and that drop-down menu has three choices: (1) "Based on SAs/TFOs observations (cold)," (2) "Based on a tip/lead," and (3) "Other." However, the form does not provide a clear definition of "cold" consent encounter and this term is not defined in the DEA Agents Manual. Not surprisingly, given this absence of a definition, one TFG member told us that this option on the DEA-177 form was misleading because he believed that cold consent encounters did not exist, despite the characterization on the DEA-177 form. Another TFO said that he did not understand the purpose of the DEA-177 form. TFG personnel and Field Division leadership indicated that the form's basis for encounter options could be improved, and one TFO told us that he had created an index card to help remind himself how to fill out the form. In light of the issues we have identified and testimony received, we believe that the DEA should promptly address this apparent confusion to ensure that it is not a cause of DEA SAs and TFOs failing to complete the form accurately and completely.

Additionally, we are concerned that, despite the DEA's representation to the OIG in 2022 that it would use the information collected on DEA-177 forms to track and analyze data associated with consensual encounters to assess their effectiveness as a law enforcement tool, we have yet to receive evidence that the DEA has conducted such an analysis. Indeed, in September 2024 the DEA told us that its Office of Regional and Local Impact and its Office of Compliance do "not possess pertinent supporting documentation necessary to ascertain the efficacy of consensual encounters taking place at mass transit facilities."

Third, we have learned during our evaluation that, while the DEA has continued to conduct interdiction activities at transportation facilities, it has not provided its transportation interdiction training, known as Operation Jetway training (Jetway training), since February 2023 and that this training has been suspended since April 2023. As a result, there have been SAs and TFOs conducting interdiction who have never completed the required training, including the TFO who detained the traveler's carry-on bag in the incident described above. In one TFG we analyzed as part of our evaluation, four of the seven personnel who

[6] Media reporting has raised concerns regarding the DEA's asset seizure and forfeiture activities in transportation interdiction settings, as well as the burdens on passengers who were not charged with a crime and who contested DEA seizures of their property. For example, see Teny Sahakian, "Court Orders DOJ to Hand Back This Man's Seized Money. How He Lost Anyway: 'Cost Me an Arm and a Leg,'" *Fox News,* August 25, 2023, www.foxnews.com/media/court-orders-doj-hand-back-mans-seized-money-how-lost-anyway-cost-arm-leg, and Justin Jouvenal, "The DEA Seized Her Father's Life Savings at an Airport Without Alleging Any Crime Occurred, Lawsuit Says," *The Washington Post,* January 15, 2020, www.washingtonpost.com/local/public-safety/the-dea-seized-her-fathers-life-savings-at-an-airport-without-alleging-any-crime-occurred-lawsuit-says/2020/01/15/1d9986e6-36e6-11ea-bb7b-265f4554af6d_story.html (both accessed October 25, 2024).

belonged to the TFG that conducted airport interdiction had not completed the required Jetway training. These personnel included the DEA Group Supervisor. This is contrary to DEA policy as described in the DEA Agents Manual, which requires all DEA SAs and TFOs participating in drug interdiction units at mass transportation facilities, as well as unit first-line supervisors, to attend and complete Jetway training. It is also contrary to representations made to the OIG in 2016 that this training would be required for all new SAs and TFOs assigned to interdiction units.

Moreover, we have serious concerns that even those TFG personnel who have met the DEA's Jetway training requirements have received inadequate and inappropriate training that was contrary to DOJ guidance, creating significant risk that such personnel will conduct transportation interdiction activities improperly. During our evaluation, we learned that in April 2023 the DEA's Office of Training completed a review of the DEA's Jetway training program and identified significant concerns about the quality of the training, as well as risks related to racial profiling. Notably, the Office of Training's report stated that the DEA's Equal Employment Opportunity Program had reviewed the Jetway training materials and found that they "included techniques that are contrary to DOJ's racial profiling guidance and, if applied, could open [the] DEA to accusations of targeting individuals based solely on protected characteristics such as race, ethnicity, or disability." Further, the Office of Training found that the Jetway training did not adequately address consensual encounters and that training documents were not fully compliant with Title VI of the Civil Rights Act or DOJ guidance for federal law enforcement agencies regarding the use of race, ethnicity, gender, national origin, religion, sexual orientation, or gender identification.[7] According to the Office of Training, the "lack of training [on consensual encounters] creates a significant risk to the DEA."[8]

Additionally, the DEA Office of Training's review found that the DEA-177 form was not consistently applied by personnel conducting transportation interdiction and that "unknown" was often selected in the required "perceived race, ethnicity, and gender of individual encountered" field to avoid the perception of bias. Further, the Office of Training found that the Jetway training program had no consolidated DEA headquarters senior leadership oversight and that the program did not align with DEA training policies or instructor-vetting practices.

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[7] DOJ, "Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity," December 2014.

[8] According to the DEA, the resulting report was not finalized and was put on hold, citing the need for additional stakeholder engagement. Nonetheless, in response to receiving the DEA Office of Training's report, the DEA Chief of Intelligence stated via email that same day, "Given the findings of this report, the Intelligence Division is permanently suspending the program." That suspension has remained in place through the date of this MAM. (The OIG has not conducted an independent evaluation of the training.)

After reviewing a draft of this MAM, DEA officials told us that, despite the Chief of Intelligence's email stating that the Jetway training program was "permanently suspend[ed]," and the fact that more than 18 months later the training program has not been restarted, the program was actually "paused" and not permanently suspended. The DEA further stated that SAs and TFOs receive DOJ-mandated non-Jetway training and additional non-Jetway training regarding consensual encounters throughout their careers. We did not find the DEA's response persuasive. Regardless of whether the Jetway training program has been permanently suspended or paused, or whether SAs and TFOs have received other, non-Jetway consensual encounter training, the DEA put in place a policy—following the OIG's 2015 report identifying serious issues with the DEA's operation of its interdiction activities at mass transportation facilities—that mandates Jetway training for its SAs and TFOs assigned to drug interdiction units at mass transportation facilities. That policy is still in place. Through this evaluation, we have learned that the DEA stopped providing that training more than 18 months ago, yet it has been conducting its mass transportation interdiction activities with personnel who have not received the training required by DEA policy.

In addition to the serious concerns that the DEA itself identified with the Jetway training provided prior to the program's suspension in April 2023, the absence of training is exacerbated by important gaps that we have identified in the DEA's policy for transportation interdiction that have left SAs and TFOs with inadequate guidance. For example, the DEA Interdiction Manual, last updated in 2010, was intended to provide guidance on legal issues relating to drug interdiction, including consensual encounters with passengers at airports. Among its provisions, the Interdiction Manual offered guidance on the temporary seizure of luggage from a departing airline passenger, stating that "detention of a bag from a departing passenger implies that a more permanent type of detention is occurring."

The DEA Interdiction Manual went on to state that "even though some cases have upheld the detention of departing passenger luggage when the detention has been of limited duration, this practice should be avoided." When we asked the DEA about this provision in connection with the incident detailed above, some DEA personnel told us that they were unaware of the Interdiction Manual. Separately and more generally, the DEA stated that the Interdiction Manual was not policy and should not have been considered as such. During our evaluation, in August 2024 we interviewed DEA Office of Chief Counsel personnel about, among other things, the Interdiction Manual. We learned that, subsequently, the Office of Chief Counsel recommended that the Interdiction Manual be removed from the DEA's employee intranet site; further, we learned that the Interdiction Manual was rescinded and removed in September 2024.[9]

Since the DEA's rescinding of the Interdiction Manual, the DEA Agents Manual remains the DEA's primary transportation facilities interdiction guidance for DEA SAs and TFOs. However, our review of the DEA Agents Manual shows that it provides limited or no guidance in multiple areas, such as how a "cold" consent encounter is defined and which indicators or factors may be appropriate for SAs and TFOs to use to approach individuals for consensual encounters. By contrast, the Interdiction Manual provided a non-exhaustive list of factors that, as of 2010, had been cited by courts as providing a basis to support a finding of reasonable suspicion, while also noting that, although "no single factor…will amount to reasonable suspicion," a "combination of…these factors, observed through the perspective of your training, can provide reasonable suspicion…." Similarly, DEA personnel who completed the Jetway training before it was suspended told us that the training had provided instruction on indicators, which interviewees described as behaviors or characteristics that may be indicative of potential criminal activity. A DEA headquarters official acknowledged that there might be confusion regarding DEA policy because it is not sufficiently detailed regarding what SAs and TFOs generally should or should not do during interdiction activities.

As noted above, in our view, proceeding with such interdiction activities in the absence of critical controls, such as adequate policies, guidance, training, and data collection, creates substantial risks that DEA SAs and TFOs will conduct these activities improperly; impose unwarranted burdens on, and violate the legal rights of, innocent travelers; imperil the Department's asset forfeiture and seizure activities; and waste law enforcement resources on ineffective interdiction actions.

On November 12, 2024, after receiving a draft of this MAM, the Deputy Attorney General issued a directive to the DEA to suspend conducting consensual encounters with individuals at mass transportation facilities pursuant to the DEA's transportation interdiction activities unless the encounters are either connected to an ongoing investigation or approved by the DEA Administrator based on exigent circumstances. The directive notes that a broader review of the costs and benefits of the transportation facilities interdiction program is needed, including whether it remains effective and useful given the DEA's priorities and limited resources. The directive therefore suspends these encounters until the utility of conducting consensual encounters

[9] After reviewing a draft of this MAM, the DEA stated that the Interdiction Manual was designed to provide case examples for SAs and TFOs and was removed to avoid confusion.

(unconnected to an existing investigation) at mass transportation facilities is evaluated and assessed, and identified concerns are sufficiently addressed. The directive further states that these encounters "may not be resumed absent explicit direction from the Deputy Attorney General."

The directive states that, while the suspension of consensual encounters pursuant to the program is intended to prohibit consensual encounters unconnected to another investigation, it is not intended to prohibit other consensual encounters in which DEA SAs and TFOs may engage. For example, with approval from the DEA Special Agent in Charge (SAC) of the Field Division, SAs and TFOs may still conduct lawful and DOJ policy-compliant consensual encounters with individuals at transportation facilities as part of a pre-planned activity in an ongoing, predicated investigation involving one or more identified targets or criminal networks. The directive further states that the receipt of travel information from a CS, standing alone, does not constitute the type of predicated, ongoing investigation that will support a consensual encounter under this directive unless the travel information has a nexus to a predicated investigation and the requisite SAC approval is obtained. According to the directive, if an exigent circumstance arises in which it would be appropriate to conduct a consensual encounter that otherwise would be prohibited under the directive, such an encounter may be approved by the DEA Administrator provided prompt notice is given to the Office of the Deputy Attorney General, the consensual encounter complies with law and current DEA policy, and the consensual encounter is appropriately documented regardless of its investigative outcome. See Appendix 1.

Recommendations

To address risks related to the DEA's transportation interdiction activities, we make the following recommendations:

To the Office of the Deputy Attorney General

1. Ensure that the DEA enforces its policy requirement for Special Agents and Task Force Officers to timely complete the DEA-177 Consensual Encounter Form for each consensual encounter, and ensure that required data is being entered.

2. Ensure that the DEA fully implements appropriate transportation interdiction training that meets the purpose and intent of the OIG's prior recommendations, incorporates DOJ guidance, and addresses the concerns identified in the DEA Office of Training's report that led the DEA to suspend its Jetway training in April 2023.

    a. Once implemented, ensure that the DEA enforces its policy requirement for Special Agents and Task Force Officers participating in drug interdiction units at mass transportation facilities to complete transportation interdiction training.

    b. Assess whether the DEA should provide additional training to DEA Special Agents and Task Force Officers who previously received Jetway training.

3. Assess whether the DEA's repeated payment of a percentage of cash forfeitures to transportation company employees, based on tips leading to seizures, over a period of years, is consistent with the Limited Use Confidential Source category and appropriate under Department of Justice policy.

4. Assess whether the DEA, in connection with its interdiction efforts at mass transportation facilities, should permit, outside the context of a predicated investigation, cash rewards to private company employees for regularly providing, over an extended period, potentially private consumer data without their employer's knowledge and without any legal process.

5. Consider whether to direct the Department of Justice law enforcement components to expand their body-worn camera policies to require the use of body-worn cameras during pre-planned consensual encounters with travelers at mass transportation facilities.

To the DEA

6. Prohibit participation in transportation interdiction activities at mass transportation facilities by DEA Special Agents and Task Force Officers who have not received appropriate training.

7. Update the policy on "Consensual Encounters Conducted at Mass Transportation Facilities" in the DEA Agents Manual to provide additional consensual encounter guidance regarding transportation interdiction activities.

8. Provide additional training or guidance on the DEA-177 Consensual Encounter Form to ensure that DEA Special Agents and Task Force Officers understand the importance of the form and how to complete it accurately. Update fields or instructions on the form, if needed.

9. Determine whether transportation interdiction activities and the use of confidential sources for this purpose is an effective use of law enforcement resources, and assess whether the benefits of these actions outweigh the potential legal risks.

The Department and the DEA have each provided a formal response to this memorandum indicating concurrence with the recommendations (Appendices 2 and 4, respectively). The OIG's analyses of each response are provided in Appendices 3 and 5, respectively. By January 10, 2025, please advise the OIG on the actions that the Department and the DEA have taken or intend to take regarding these issues. If you have any questions or would like to discuss the information in this memorandum, please contact me at (202) 514-3435 or Donellen Schlosser, Chief Inspector, acting in the role of Assistant Inspector General, Evaluation and Inspections, at (202) 616-4620.

cc: Marshall L. Miller
Principal Associate Deputy Attorney General, Office of the Deputy Attorney General

Adam Chandler
Chief of Staff and Associate Deputy Attorney General, Office of the Deputy Attorney General

Bradley Weinsheimer
Associate Deputy Attorney General, Office of the Deputy Attorney General

George Turner
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Katie Medearis
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Edward J. Kovacs
Chief Compliance Officer, Office of Compliance, Drug Enforcement Administration

Janice O. Swygert
Program Manager, External Audit Liaison Section, Office of Compliance, Drug Enforcement Administration

Louise M. Duhamel, Ph.D.
Assistant Director, Internal Review and Evaluation Office, Justice Management Division

Appendix 1: Transportation Facilities Interdiction Program Directive

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

November 12, 2024

MEMORANDUM FOR ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION

FROM: THE DEPUTY ATTORNEY GENERAL

SUBJECT: Transportation Facilities Interdiction Program Directive

Internal and ongoing reviews by the Department of Justice, Drug Enforcement Administration (DEA), and Office of Inspector General have identified concerns with DEA's use of consensual encounters unconnected to an existing investigation with individuals at mass transportation facilities as part of the DEA's broader transportation interdiction activities ("transportation facilities interdiction program" or "program"). These reviews have prompted the need for a broader review of the costs and benefits of the program, including whether it remains effective and useful given DEA's priorities and limited resources.

Until the utility of conducting consensual encounters pursuant to the transportation interdiction facilities program is evaluated, assessed, and identified concerns are sufficiently addressed, I am directing that the DEA suspend conducting consensual encounters pursuant to the program, subject to my further review following the assessment and evaluation. Consensual encounters pursuant to the program may not be resumed absent explicit direction from the Deputy Attorney General.

While suspending consensual encounters pursuant to the program is intended to prohibit consensual encounters unconnected to another investigation, it is not intended to prohibit other consensual encounters in which DEA Special Agents (agents) and task force officers (TFOs) may engage. For example, with approval from the Special Agent in Charge (SAC) of the Field Division, agents and TFOs still may conduct lawful and DOJ policy-compliant consensual encounters with individuals at transportation facilities as part of a pre-planned activity in an ongoing, predicated investigation involving one or more identified targets or criminal networks. Note that the receipt of travel information from a confidential source, standing alone, does not constitute the type of predicated, ongoing investigation which will support a consensual encounter under this Directive unless the travel information has a nexus to a predicated investigation and the requisite SAC approval is obtained. At the same time, if an exigent circumstance arises in which it would be appropriate to conduct a consensual encounter that otherwise would be prohibited under this directive, such an encounter may be approved by the DEA Administrator provided prompt notice is given the Office of the Deputy Attorney General, the consensual encounter complies with law and current DEA policy, and the consensual encounter is appropriately documented regardless of its investigative outcome.

Consensual encounters are an important tool used by law enforcement in the investigation of potential criminal conduct. When used appropriately, these encounters advance the interests of public safety and help ensure those encountered are kept safe and treated with the respect and dignity every individual has the right to expect when engaging with members of law enforcement. By suspending the use of consensual encounters pursuant to DEA's transportation interdiction facilities program and authorizing it to be restarted only when its utility has been properly evaluated and assessed — and appropriate policies and training have been implemented — we help ensure that the Department is fulfilling its mission to keep the American people safe, protect civil rights, and uphold the rule of law.

Appendix 2: The Department's Response to the Draft Report

U.S. Department of Justice

Office of the Deputy Attorney General

Office of the Deputy Attorney General

950 Pennsylvania Ave., N.W.
RFK Main Justice Bldg.
Washington, D.C. 20530

MEMORANDUM

TO: Donellen Schlosser
Acting Assistant Inspector General

FROM: Bradley Weinsheimer
Associate Deputy Attorney General
Office of the Deputy Attorney General

Katie B. Medearis
Associate Deputy Attorney General
Office of the Deputy Attorney General

DATE: November 19, 2024

SUBJECT: Department of Justice's Response to draft Management Advisory Memorandum, "*Notification of Concerns Identified in the Drug Enforcement Administration's Transportation Interdiction Activities*"

The Department of Justice appreciates the opportunity to respond to the Office of the Inspector General (OIG) Management Advisory Memorandum (MAM) entitled, "*Notification of Concerns Identified in the Drug Enforcement Administration's Transportation Interdiction Activities*." The Department recognizes the importance of the OIG's work on this issue.

Prior to issuance of the MAM, the Department and DEA were collectively evaluating the DEA's use of consensual encounters as part of its interdiction activities at mass transportation centers ("the program"). While these internal reviews were pending, the OIG issued the draft MAM and raised related concerns based on its review. In connection with initial analysis and discussions between the Department, the DEA, and the IG, the Deputy Attorney General (DAG) issued a memorandum directing the DEA to suspend the program until an assessment is completed, identified concerns addressed, and the DAG approves resumption of the program. See MAM, Appendix 1 (DAG Directive).

The Department concurs with each of the five recommendations directed to the Office of the Deputy Attorney General (ODAG). ODAG will coordinate with the DEA and other law enforcement components, as appropriate, in response to each recommendation. The steps taken to close many of the recommendations will depend, in part, on whether the DEA proposes resumption of the transportation interdiction program.

Appendix 3: OIG Analysis of the Department's Response

The OIG provided a draft of this Management Advisory Memorandum (MAM) to the Office of the Deputy Attorney General (ODAG), and ODAG provided a formal response on behalf of the Department, which is included in Appendix 2. The OIG's analysis of ODAG's response and the actions necessary to close the recommendations are discussed below.

The Department stated in its response that it and the DEA were collectively evaluating the DEA's use of consensual encounters as part of its interdiction activities at mass transportation centers ("the program") and noted that the Deputy Attorney General has issued a memorandum directing the DEA to suspend the program until an assessment is completed, identified concerns are addressed, and the Deputy Attorney General approves resumption of the program (see the Deputy Attorney General's November 12, 2024 memorandum included in Appendix 1). The response further stated that the Department concurred with each of the five recommendations directed to ODAG and that it would coordinate with the DEA and other law enforcement components, as appropriate, in response to each recommendation. The Department stated that the steps taken to close many of the recommendations will depend, in part, on whether the DEA proposes resumption of the transportation interdiction program.

Recommendation 1

Ensure that the DEA enforces its policy requirement for Special Agents and Task Force Officers to timely complete the DEA-177 Consensual Encounter Form for each consensual encounter, and ensure that required data is being entered.

Status: Resolved.

Department Response: The Department concurred with this recommendation and stated that it would coordinate with the DEA and other law enforcement components, as appropriate, in response to each recommendation. The Department stated that the steps taken to close many of the recommendations will depend, in part, on whether the DEA proposes resumption of the transportation interdiction program.

OIG Analysis: The Department's planned actions are responsive to the recommendation. By January 10, 2025, please provide documentation demonstrating that the Department has coordinated with the DEA to ensure that, for consensual encounters in predicated investigations with one or more identified targets or criminal networks, and for other consensual encounters if an interdiction program at mass transportation facilities is authorized to resume, that the DEA has in place a mechanism to enforce its policy requirement for Special Agents (SA) and Task Force Officers (TFO) to timely complete the DEA-177 Consensual Encounter Form for each consensual encounter and ensure that required data is being entered.

Recommendation 2

Ensure that the DEA fully implements appropriate transportation interdiction training that meets the purpose and intent of the OIG's prior recommendations, incorporates DOJ guidance, and addresses the concerns identified in the DEA Office of Training's report that led the DEA to suspend its Jetway training in April 2023.

a. Once implemented, ensure that the DEA enforces its policy requirement for Special Agents and Task Force Officers participating in drug interdiction units at mass transportation facilities to complete transportation interdiction training.

b. Assess whether the DEA should provide additional training to DEA Special Agents and Task Force Officers who previously received Jetway training.

Status: Resolved.

Department Response: The Department concurred with this recommendation and stated that it would coordinate with the DEA and other law enforcement components, as appropriate, in response to each recommendation. The Department stated that the steps taken to close many of the recommendations will depend, in part, on whether the DEA proposes resumption of the transportation interdiction program.

OIG Analysis: The Department's planned actions are responsive to the recommendation. By January 10, 2025, please provide documentation demonstrating that the Department has ensured that the DEA fully implements appropriate transportation interdiction training that meets the purpose and intent of the OIG's prior recommendations, incorporates DOJ guidance, and addresses the concerns identified in the DEA Office of Training's report that led the DEA to suspend its Jetway training in April 2023. Further, once implemented, please provide documentation demonstrating that the Department has enforced its policy requirement for SAs and TFOs participating in drug interdiction units at mass transportation facilities to complete transportation interdiction training. Finally, please provide the results of the Department's assessment of whether the DEA should provide additional training to DEA SAs and TFOs who previously received Jetway training, including any supporting documentation, or an update on its progress.

Recommendation 3

Assess whether the DEA's repeated payment of a percentage of cash forfeitures to transportation company employees, based on tips leading to seizures, over a period of years, is consistent with the Limited Use Confidential Source category and appropriate under Department of Justice policy.

Status: Resolved.

Department Response: The Department concurred with this recommendation and stated that it would coordinate with the DEA and other law enforcement components, as appropriate, in response to each recommendation. The Department stated that the steps taken to close many of the recommendations will depend, in part, on whether the DEA proposes resumption of the transportation interdiction program.

OIG Analysis: The Department's planned actions are responsive to the recommendation. By January 10, 2025, please provide the results of the Department's assessment, including any supporting documentation, or an update on its progress.

Recommendation 4

Assess whether the DEA, in connection with its interdiction efforts at mass transportation facilities, should permit, outside the context of a predicated investigation, cash rewards to private company employees for regularly providing, over an extended period, potentially private consumer data without their employer's knowledge and without any legal process.

Status: Resolved.

Department Response: The Department concurred with this recommendation and stated that it would coordinate with the DEA and other law enforcement components, as appropriate, in response to each recommendation. The Department stated that the steps taken to close many of the recommendations will depend, in part, on whether the DEA proposes resumption of the transportation interdiction program.

OIG Analysis: The Department's planned actions are responsive to the recommendation. By January 10, 2025, please provide the results of the Department's assessment, including any supporting documentation, or an update on its progress. The Department may also want to consider and assess whether such rewards

to private company employees for regularly providing, over an extended period, potentially private consumer data without their employer's knowledge and without any legal process, is appropriate in predicated investigations.

Recommendation 5

Consider whether to direct the Department of Justice law enforcement components to expand their body-worn camera policies to require the use of body-worn cameras during pre-planned consensual encounters with travelers at mass transportation facilities.

Status: Resolved.

Department Response: The Department concurred with this recommendation and stated that it would coordinate with the DEA and other law enforcement components, as appropriate, in response to each recommendation. The Department stated that the steps taken to close many of the recommendations will depend, in part, on whether the DEA proposes resumption of the transportation interdiction program.

OIG Analysis: The Department's planned actions are responsive to the recommendation. By January 10, 2025, please provide documentation demonstrating that the Department has considered whether to direct the DOJ law enforcement components to expand their body-worn camera policies to require the use of body-worn cameras during pre-planned consensual encounters with travelers at mass transportation facilities, including for such encounters as part of a predicated investigation, as well as upon a potential future resumption of the program.

Appendix 4: The DEA's Response to the Draft Report

U.S. Department of Justice
Drug Enforcement Administration
Office of Compliance
8701 Morrissette Drive
Springfield, Virginia 22152

www.dea.gov

MEMORANDUM

TO: Michael E. Horowitz
Inspector General
Department of Justice
Office of the Inspector General

FROM: Edward J. Kovacs
Chief of Compliance
Drug Enforcement Administration
Office of Compliance

EDWARD KOVACS
Digitally signed by EDWARD KOVACS
Date: 2024.11.19 14:23:53 -05'00'

SUBJECT: DEA Response to Office of the Inspector General Draft Management Advisory Memorandum titled *Notification of Concerns Identified in the Drug Enforcement Administration's Transportation Interdiction Activities*

The Drug Enforcement Administration (DEA) has received the Department of Justice (DOJ), Office of the Inspector General (OIG), Evaluation and Inspection Division, Management Advisory Memorandum (MAM) titled, "*Notification of Concerns Identified in the Drug Enforcement Administration's Transportation Interdiction Activities.*" DEA concurs with concerns identified in the MAM regarding DEA-177 Forms not being complete and timely and with the finding that not all DEA Special Agents and Task Force Officers participating in interdiction groups have completed Jetway training.

In response to the MAM, DEA has raised concerns with OIG, including: OIG reliance on a draft DEA Office of Training Report that was never issued by DEA, and OIG's concerns about removal of an interdiction manual when all relevant DEA policies and procedures on interdiction activities are included in the DEA Agents' Manual, which is accessible to all agents and employees.

OIG issued a total of nine recommendations in this report. Recommendations 1-5 were addressed to the Office of the Deputy Attorney General (ODAG) and recommendations 6-9 were addressed to DEA. The below responses address the recommendations made to DEA.

6. Prohibit participation in transportation interdiction activities at mass transportation facilities by DEA Special Agents and Task Force Officers who have not received appropriate training.

<u>**DEA Response**</u>

DEA concurs with the recommendation.

As a result of the Deputy Attorney General's Transportation Facilities Interdiction Program Directive (DAG's Directive), issued on November 12, 2024, DEA has suspended conducting consensual encounters pursuant to the program. In accordance with the DAG's Directive, DEA will only conduct consensual encounters at transportation facilities if connected to an ongoing investigation and with approval of the Field Division Special Agent in Charge. In exigent circumstances, the DEA Administrator may approve a consensual encounter at a transportation facility that would otherwise be prohibited by the DAG's Directive provided that the Administrator provides notice to the Office of the Deputy Attorney General and the encounter is appropriately documented.

DEA has been conducting its own internal review and evaluation of its Transportation Interdiction Program. As part of the internal review, DEA is assessing how it can most effectively use its limited resources to further its core mission - saving lives by defeating the two criminal networks in Mexico, the Sinaloa and Jalisco cartels, which are responsible for the fentanyl and methamphetamine that is killing Americans.

7. Update the policy on "Consensual Encounters Conducted at Mass Transportation Facilities" in the DEA Agents Manual to provide additional consensual guidance regarding transportation interdiction activities.

<u>**DEA Response**</u>

DEA concurs with the recommendation.

8. Provide additional training or guidance on the DEA-177 Consensual Encounter Form to ensure that DEA Special Agents and Task Force Officers understand the importance of the form and how to complete it accurately. Update fields or instructions on the form, if needed.

<u>**DEA Response**</u>

DEA concurs with the recommendation.

9. Determine whether transportation interdiction activities and the use of confidential sources for this purpose is an effective use of law enforcement resources and assess whether the benefits of these actions outweigh the potential legal risks.

<u>**DEA Response**</u>

DEA concurs with the recommendation.

If you have any questions or concerns regarding DEA's response, please contact Janice Swygert, Program Manager, External Audit Liaison Section, at (571) 776-3119.

Appendix 5: OIG Analysis of the DEA's Response

The OIG provided a draft of this Management Advisory Memorandum (MAM) to the DEA, and the DEA provided a formal response, which is included in Appendix 4.

In its formal response, the DEA stated that it concurs with concerns identified in this MAM regarding DEA Consensual Encounter Forms (DEA-177 forms) not being complete and timely, and that not all DEA Special Agents (SA) and Task Force Officers (TFO) participating in interdiction groups have completed Jetway training. The DEA response also stated that the DEA had raised concerns with the OIG about the draft MAM, including the OIG's reliance on what the DEA asserted was a draft DEA Office of Training report that, according to the DEA response, was "never issued" by the DEA, and the OIG's reference to the DEA's removal of its Interdiction Manual because, the DEA stated, all relevant DEA policies and procedures on interdiction activities are included in the DEA Agents Manual, which it noted is accessible to all agents and employees.

The DEA previously raised concerns with the OIG about the MAM's reference to its Office of Training's report and its Interdiction Manual, which we referenced above in footnotes 8 and 9. With regard to the OIG's reliance on the DEA Office of Training's report, we note that documentation provided by the DEA showed that the DEA's Intelligence Division decided to suspend the program based on the findings of the report. In addition, the report was signed by senior DEA officials, apparently indicating their approval of it. With regard to the DEA Interdiction Manual, which was last updated in 2010, despite the DEA's statement that all relevant policies and procedures on interdiction activities are included in the DEA Agents Manual, this MAM identified that the DEA Agents Manual provided limited or no guidance in multiple areas, which has left SAs and TFOs with inadequate guidance.

The OIG's analysis of the DEA's response regarding specific recommendations and the actions necessary to close them are discussed below.

Recommendation 6

Prohibit participation in transportation interdiction activities at mass transportation facilities by DEA Special Agents and Task Force Officers who have not received appropriate training.

Status: Resolved.

DEA Response: The DEA concurred with this recommendation and stated that, as a result of the Deputy Attorney General's Transportation Facilities Interdiction Program directive issued on November 12, 2024, the DEA has suspended conducting consensual encounters pursuant to the program. The DEA stated that, in accordance with the directive, the DEA will conduct consensual encounters at transportation facilities only if connected to an ongoing investigation and with approval of the Field Division Special Agent in Charge (SAC). The DEA further stated that, in exigent circumstances, the DEA Administrator may approve a consensual encounter at a transportation facility that would otherwise be prohibited by the directive provided that the Administrator provides notice to the Office of the Deputy Attorney General and the encounter is appropriately documented. The DEA stated that it has been conducting its own internal review and evaluation of its Transportation Interdiction Program and that, as part of this review, the DEA is assessing how it can most effectively use its limited resources to further its core mission—which the DEA described as saving lives by defeating the two criminal networks in Mexico, the Sinaloa and Jalisco cartels, which are responsible for the fentanyl and methamphetamine that are killing Americans.

OIG Analysis: The DEA's planned actions are partially responsive to the recommendation. The DEA stated that, absent exigent circumstances and approval by the DEA Administrator, it would conduct consensual encounters at transportation facilities only if "connected to an ongoing investigation" and with the approval

of the Field Division SAC. We note, however, that the Deputy Attorney General's directive used different, and potentially narrower, language to describe this scenario: it stated that the encounter must take place "in an ongoing, predicated investigation involving one or more identified targets or criminal networks" and also receive the approval of the Field Division SAC. In any event, to meet the intent of this recommendation, the DEA must ensure that any DEA SAs and TFOs who conduct such consensual encounters permitted under the conditions established in the Deputy Attorney General's directive have received the appropriate training.

By January 10, 2025, please provide evidence that, in the event that interdiction at mass transportation facilities is authorized to resume: (1) the DEA has prohibited SAs and TFOs from participation in interdiction activities at mass transportation facilities if they have not received the appropriate training and (2) SAs and TFOs who have participated in interdiction activities at mass transportation facilities since the issuance of this MAM have received appropriate training.

Recommendation 7

Update the policy on "Consensual Encounters Conducted at Mass Transportation Facilities" in the DEA Agents Manual to provide additional consensual encounter guidance regarding transportation interdiction activities.

Status: Resolved.

DEA Response: The DEA concurred with this recommendation.

OIG Analysis: By January 10, 2025, please provide documentation demonstrating that the DEA has updated the policy on "Consensual Encounters Conducted at Mass Transportation Facilities" in the DEA Agents Manual to provide additional consensual encounter guidance regarding transportation interdiction activities, including consensual encounters in predicated investigations.

Recommendation 8

Provide additional training or guidance on the DEA-177 Consensual Encounter Form to ensure that DEA Special Agents and Task Force Officers understand the importance of the form and how to complete it accurately. Update fields or instructions on the form, if needed.

Status: Resolved.

DEA Response: The DEA concurred with this recommendation.

OIG Analysis: By January 10, 2025, please provide documentation demonstrating that the DEA has provided additional training or guidance on the DEA-177 form, including its use in predicated investigations. Additionally, if the DEA determines that it needs to update fields or instructions on the DEA-177 form, please provide copies of the updated form and documentation demonstrating that the updated form has been implemented.

Recommendation 9

Determine whether transportation interdiction activities and the use of confidential sources for this purpose are an effective use of law enforcement resources, and assess whether the benefits of these actions outweigh the potential legal risks.

Status: Resolved.

DEA Response: The DEA concurred with this recommendation.

OIG Analysis: By January 10, 2025, please provide documentation demonstrating that the DEA has determined whether transportation interdiction activities, including consensual encounters at mass transportation facilities and the use of confidential sources employed by private companies for this purpose, are an effective use of law enforcement resources. Further, please provide the results of the DEA's assessment of whether the benefits of these actions outweigh the potential legal risks, including any documentation or analysis used to support the assessment, or provide an update on its progress.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REBECCA BROWN, AUGUST TERRENCE ROLIN, STACY JONES-NASR, and MATTHEW BERGER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TRANSPORTATION SECURITY ADMINISTRATION; ADAM STAHL, in his official capacity as Senior Official Performing the Duties of the Administrator of the Transportation Security Administration; DRUG ENFORCMENT ADMINISTRATION; DEREK S. MALTZ, in his official capacity as Acting Administrator of the Drug Enforcement Administration; UNITED STATES OF AMERICA,

Defendants.

Civil Action No. 2:20-cv-64-MJH-KT

PROPOSED ORDER

Upon consideration of Defendants' Partial Motion to Dismiss, it is hereby **ORDERED** that the motion is **GRANTED**. Count III of Plaintiffs' First Amended Complaint is **DISMISSED** in its entirety without prejudice. Defendants Drug Enforcement Administration and Derek S. Maltz, in his official capacity as Acting Administrator of the Drug Enforcement Administration, are **DISMISSED** from this proceeding.

SO ORDERED.

Date: _______________, 2025

____
The Hon. Kezia O. L. Taylor
United States Magistrate Judge